United States Court of Appeals

for the Second Circuit

APPENDIX

ORIGINAL WITH PROOF OF SERVICE

75-7676

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

B

P/S

CHARLES AKNIN and AKNIN CORPORATION,

Plaintiffs-Appellants,

-against-

EDITH SIDEMAN, "JOHN DOE", "RICHARD ROE" and "THOMAS HOE",

Defendants-Appellees,

-and-

ARTHUR PHILLIPS, JR., ARMAND GIANUNZIO, JOSEPH NATARO, DANIEL NATCHES, EMILIO A. DE D'BRAMO, HENRY A. GRUSE, ANGELO C. MUSTICH, LOUIS LIFRIERI, THOMAS FORTE and MICHAEL ROTH,

Defendants.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX

BUTLER, JABLOW & GELLER
Attorneys for Plaintiffs-Appellants
400 Madison Avenue
New York, New York 10017
(212) 755-2040

ZIMMER, FISHBACH & HERTAN
Attorneys for Defendant-Appellee Edith Sideman
919 Third Avenue
New York, New York 10022

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(5259A) COUNSEL PRESS, INC., 55 West 42nd Street, New York, N.Y. 10036 • PE 6-8460

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CIVIL DOCKET

UNITED STATES DISTRICT COURT

DOCKET ENTRIES

JUDGE DRIEANT

75 CIV. 3231

Jury demand date:

Form No. 106 Rev.

TITLE OF CASE	ATTORNEYS
08-1 75 3231 07 01 75 3 480 1 2,600.	0852
	For plaintiff:
KIN, CHARLES.,	
KIN CORPORATION	BUTLER JABLOW & GELLER 400 Madison Ave. New York, N.Y. 11017 Plaza 5-2040
Vs.	
	For defendant:
ILLIPS, JR., ARTHUR.,	Clark Gagliardi & Miller 175 Main St. White Plains, N.Y. 10601 914-946-8900 (Defts Phillips, Gianunzio, Nataro, Natches, De D'Bramo, Gruse, Mustich, Lifrieri & Forte)
ANUNZIO, ARMAND.,	
TARO, JOSEPH.,	
TCHES, DANIEL.,	
BRAMO, EMILIO A. DE.,	
USE, HENRY A.,	
STICH, ANGELO C.,	
FRIERI, LOUIS.,	LOUIS J. LEFKOWITZ, Two World Trade Center New York, N.Y. 10047 488-3396 (Defts. Atty. Michael Roth.)
RTE, THOMAS.,	
TH, MICHAEL..	
11-28-75 JWG	
", 11-28-75 "	Louis C. Fieland 919 Third Ave. NYC 10022 752-4433 (Edith Sideman)
", 11-28-75 "	
11-28-75 "	

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	DISB.
5 mailed X	Clerk		JUL 1 1975	R4106		
6 mailed	Marshal					
sis of Action: Civil Rights 2,600	Docket fee					
	Witness fees					
tion arose at:	Depositions					

DOCKET ENTRIES

CHARLES AKMIN et ano Vs. ARTHUR PHILLIPS, JR., et al

75 Civ 3231
JUDGE BRIEANT

DATE	PROCEEDINGS	Date Orde Judgment
06-01-75	Filed complt. and issued summons.	
8-1-75	Filed Summons with Marshal's return Served:	
	H. A. Gruse by. Patti Gruse on 7-15-75.	
	J. Notaro " Joseph Fraioli " 7-10-75	
	Armand Gianunzio " Joseph Fraioli " " " "	
	Edith Sidman " Person Service " 7-15-75	
	Michael Roth " Micheline Roth " " " "	
	Louis Bifrieri " Joseph Fraioli " 7-10-75	
	Angelo C. Mustich " " " " " " "	
	Thomas Forte " " " " " " "	
	Daniel Natches " " " " " " "	
	Emilio A. De D'Bramo " " " " " " "	
	Arthur Philips, Jr. " " " " " " "	
9-8-75	Filed certain defts ANSWER to the complt.	CG&M
9-8-75	Filed certain defts notice to take deposition of pltffs.	
9-8-75	Filed certain defts notice for discovery & inspection.	
9-8-75	Filed certain defts demand for list of those who have appeared.	
9-11-75	Filed Deft. E. Sideman's Notcice of Motion for an order pur to Rule 12 FRCP to dismiss the ~~xxxxx~~ the complt as to this deft.....ret. 9-25-75...at 9:30AM.	
9-23-75	Filed Deft. Michael Roth's Answer to Complt. LJ LJL	
9-26-75	Filed Stip & Order adj Deft's E. Sideman's motion to dismiss ~~for~~ 10-16-75 at 9:30AM.....Brieant,J.	
10-17-75	Filed Stip & Order that deft. E. Sidemena's Motion to dismiss the cmoplt is adj ~~to~~ 10-22 75....at 9:30AM....Brieant,J.	
10-20-75	Filed certain defts demand for answers to interrogs.	
10-31-75	Filed pltffs affdvt in opposition to deft (Sideman's) motion to dismiss the complt.	
11-7-75	Filed Memorandum-Decision #43368. Deft Edith Sideman by motion of 10-28-75, has moved for summary judgment to dismiss the complt as to her. For reasons indicated, summary judgment is granted as to deft Sideman & her co defts, Doe, Roe & Hoe, only, & the caption of the action is amended to remove to remove their names, & a final judgment should be filed as to them. Counsel for Mrs. Sideman shall settle a final judgment on five days notice.....BRIEANT,J m/n.	
11-18-75	Filed pltffs affdvt & notice of motion to grant a rehearing of deft (Edith Sideman) motion for summary judgment. Ret. 11-24-75.	
11-24-75	Filed deft (Sideman's) affdvt in opposition to pltffs motion for a rehearing.	
11-24-75	Filed Memo-End. on motion of 11-18-75. Motion denied....So Ordered, BRIEANT,J m/n	
11-28-75	Filed Judgment(as to deft Sideman et al only) Ordered that summ judg is granted pur to FRCP 56, and the complt is dismissed as to deft Edith Sideman and the Defts. "John Doe", "Richard Roe" and "Thomas Hoe"; and that pltffs take nothing of said defts...and that the action is dismissed as to said defts on the merits.. .....and that deft. Edith Sideman recover fr the pltffs C. Akmin and Akmin Corp her cost of this action...and that the caption of this action is hereby amended by deleting the names of the defts. Edith Sideman, "John Doe" & "Thomas Hoe"... .....Brieant,J. mn Judgment Entered...11-28-75..Clerk ent 12-2-75.	
12-5-75	Filed Pltffs' Notice of Appeal to USCA by judg. dismissing the action as certain defts....Notices Mailed on 12-5-75 To:Zimmer, Fishbach & Herten Esqs. & Clark, Gagliardi, & Miller Esqs.,Atty Gen of the state of NY.	
12-16-75	Filed Notice to Docket Cl that the record has been certified and transmitted to USCA on 12-16-75.	

COMPLAINT

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

CHARLES AKNIN and AKNIN CORPORATION, Plaintiffs, -against- ARTHUR PHILLIPS, JR., ARMAND GIANUNZIO, JOSEPH NATARO, DANIEL NATCHES, EMILIO A. DE D'BRAMO, HENRY A. GRUSE, ANGELO C. MUSTICH, LOUIS LIFRIERI, THOMAS FORTE, MICHAEL ROTH, EDITH SIDEMAN, "JOHN DOE," "RICHARD ROE" and "THOMAS HOE," Defendants.	:	Civil Action File No. COMPLAINT

Plaintiffs, by their attorneys, Butler, Jablow & Geller, for their complaint in this action, allege as follows:

FOR A FIRST CAUSE OF ACTION

1. This cause of action is for declaratory and injunctive relief and also for money damages and arises under the First, Fifth and Fourteenth Amendments to the Constitution of the United States and under Sections 1983 and 1985 of Title 42 of the United States Code.

2. Jurisdiction is conferred on this Court by 28 U.S.C. § 1343.

3. At the times mentioned herein, plaintiff Charles Aknin was and now is a citizen and resident of the Village of Mamaroneck, County of Westchester, State of New York, and the president and a stock-

holder of plaintiff Aknin Corporation.

4. At the times herein mentioned, plaintiff Aknin Corporation was and is a corporation organized and existing under the laws of the State of New York, with its office and place of business at 1521 East Post Road in the Village of Mamaroneck (hereinafter the "Village").

5. On information and belief, at the times herein mentioned, defendant Arthur Phillips, Jr., was and now is the Mayor and a resident of the Village, defendant Armand Gianunzio was and now is the Village Manager and a resident of the Village, defendant Joseph Nataro was and now is the Village Attorney and a resident of the Village, defendants Daniel Natches, Emilio A. De D'Bramo and Angelo C. Mustich, were and now are members of the Board of Trustees and residents of the Village, defendant Louis Lifrieri was and now is the Police Chief and a resident of the Village, defendant Thomas Forte was and now is the Building Inspector and a resident of the Village, defendant Michael Roth was and now is a resident of the Village, defendant Edith Sideman was and now is a resident of the Village, and defendants "John Doe," "Richard Roe" and "Thomas Hoe" were and now are other residents of the Village whose names are presently unknown to plaintiffs. On information and belief, at the times herein mentioned until in or about March, 1975, defendant Henry A. Gruse was a member of the Board of Trustees and a resident of the Village.

6. In or about January, 1974, plaintiffs decided to discontinue a restaurant they had theretofore operated at their place of business and to open a discotheque at the premises.

7. Thereafter, plaintiffs duly filed plans for the alteration of the premises with all authorities having jurisdiction of such matters, duly caused alterations to be made in accordance with those plans, and duly obtained a certificate of occupancy to operate a discotheque.

8. At or about the beginning of April, 1974, plaintiffs opened their discotheque for business under the name of "Zazou."

9. Plaintiffs' discotheque was an immediate success and during the months of April, May and June, 1974, it earned for the corporate plaintiff an average net profit of approximately $10,000 per month, after payment to the individual plaintiff of a salary of $550 per week.

10. Plaintiffs' discotheque, however, attracted patrons who were of an age, social and economic group substantially different from that of the residents of the area, and for that reason the presence of the discotheque was resented by the residents.

11. Accordingly, some of the residents, including those who are defendants in this action, began to exert pressure on the defendants who are public officials to do whatever the latter could to close down plaintiffs' discotheque, and such pressure gave rise to the illegal and unconstitutional conspiracy and acts hereinafter set forth.

12. Commencing at or about the beginning of July, 1974, and continuing to the present day, defendants, individually and in conspiracy with each other, have taken action to close down plaintiffs' discotheque and otherwise to deprive plaintiffs of rights, privileges and immunities secured to them by the Constitution and the laws of the United States, the equal protection of the laws and equal privileges and immunities thereunder.

13. At or about the beginning of July, 1974, defendants attempted to close down plaintiffs' discotheque on the pretext that the building in which the discotheque was located was in a dangerous condition by reason of certain conditions that officials of the Department of Labor of the State of New York had found upon inspection of the premises.

14. On or about July 2, 1974, without prior notice to plaintiffs, defendants, acting through officials of the Building Department of the Village, revoked the certificate of occupancy of the building in which plaintiffs' discotheque was located and posted a sign outside the building that it was closed because of a "dangerous condition."

15. When, because of the approaching July 4th weekend, plaintiffs refused to close down their discotheque, defendants, acting through the Police Department of the Village, caused the individual plaintiff to be charged with maintaining a criminal nuisance.

16. The individual plaintiff was subsequently acquitted of the aforementioned charge of maintaining a criminal nuisance after trial by jury.

17. On or about July 7, 1974, plaintiffs did in fact close down their discotheque, and they kept it closed until on or about July 19, 1974, during which time they duly completed the alterations prescribed by the Department of Labor of the State of New York, both to the satisfaction of that Department and of the Building Department of the Village, and they received permission from the latter Department to re-open their

discotheque.

18. When, however, on or about July 19, 1974, plaintiffs re-opened their discotheque, defendants, acting through the Police Department of the Village, caused the individual plaintiff to be charged with the first of numerous violations or alleged violations of two ordinances of the Village, and since that time defendants have caused the individual plaintiff to be charged with similar violations on various occasions, the most recent of which took place in or about May, 1975.

19. One of the aforementioned ordinances, which is set forth in Chapter 4, Section 10, Subdivision 5, of the Ordinances of the Village, contains, among other things, provisions prohibiting or purporting to prohibit the playing of music or dancing in establishments licensed under the ordinance between the hours of 1:00 a.m. and 8:00 a.m. on weekdays and between the hours of 2:00 a.m. and 8:00 a.m. on Saturdays, Sundays and legal holidays.

20. The second of the aforementioned ordinances, which is set forth in Chapter 4, Section 8, Subdivision 3(b), of the Ordinances of the Village, contains, among other things, provisions prohibiting or purporting to prohibit noise emanating from any premises in the Village which can be heard at a distance of more than 100 feet from such premises

21. The aforementioned ordinance limiting or purporting to limit the hours for the playing of music and dancing violates the rights reserved to plaintiffs and others similarly situated under the First, Fifth and Fourteenth Amendments of the Constitution of the United States, in that, among other things --

(a) it restrains them from engaging in normal forms of expression and following normal social, cultural and business pursuits that are beyond the powers of any of the defendants or any other governmental authorities or persons to regulate, especially in the absence of any reasonably perceived danger to the health or welfare of the citizens of the Village, not present in the circumstances of this case;

(b) it is discriminatory or open to discrimination in its application in that it permits the authorities of the Village having jurisdiction in such matters to extend the hours for the playing of music and dancing in individual establishments on "special occasions," without setting forth any definition of "special occasions" or any procedures for the hearing and determination of applications relating to such occasions;

(c) it fixes hours for the playing of music and dancing arbitrarily and capriciously.

22. Moreover, defendants have caused the aforementioned ordinance limiting or purporting to limit the hours for the playing of music and dancing to be applied against plaintiffs in a manner that violates the rights reserved to plaintiffs under the Fifth and Fourteenth Amendments to the Constitution of the United States, in that at the time the ordinance was first invoked against plaintiffs it was not otherwise being enforced by defendants or any other persons having jurisdiction of such matters, and had not been enforced for many years.

23. At the time the aforementioned ordinance limiting or purporting to limit the hours for the playing of music and dancing was first invoked against the individual plaintiff, there were several establish-

ments in the Village other than plaintiffs' discotheque that were known by defendants to be operating in daily violation of the terms of the ordinance, but none of those establishments or the individuals who owned or operated them were charged by defendants or by any other persons having jurisdiction of such matters with any such violation until several weeks after the individual plaintiff was first charged with such violations, by which time defendants had become aware that their failure to act against establishments other than plaintiffs' discotheque was additional proof, if such was necessary, that they were guilty of selective prosecution of the individual plaintiff.

24. On information and belief, the aforementioned ordinance limiting or purporting to limit the hours for the playing of music and dancing had not been enforced by the defendants who are officials or other persons having jurisdiction of such matters, or their predecessors in office, at any time during the approximately 40 years since the ordinance had first become effective, and the one occasion on which it had been enforced had taken place more than 10 years prior to the date the individual plaintiff was first charged with a violation of the ordinance.

25. The aforementioned ordinance prohibiting or purporting to prohibit noise violates the rights reserved to plaintiffs and others similarly situated under the First, Fifth and Fourteenth Amendments to the Constitution of the United States, in that it imposes an arbitrary, capricious and unnecessary restraint upon all forms of communication or expression by sound in a manner that is vague, over-broad and unconnected with any scientific, medical or other reasonable standards for the determination of what is or should be deemed to be noise harmful to the

citizens of the Village.

26. In addition to the foregoing, defendants have caused the individual plaintiff to be prosecuted under both of the aforementioned ordinances in a manner that violates the rights reserved to him under the Fifth and Fourteenth Amendments to the Constitution of the United States in that defendants have prevented the individual plaintiff from having a fair trial of the charges brought against him for violation of the ordinances, and they have otherwise prevented him from having the benefits of due process.

27. After the individual plaintiff was first charged with violation of the aforementioned ordinances and before his trial therefor, both plaintiffs were the subject of widespread adverse publicity within the Village, in the local newspaper and other media and in public meetings.

28. Moreover, before the individual plaintiff was first brought to trial on some of the aforementioned charges, both he and the corporate plaintiff had filed notices of claim of damages in excess of $2,000,000 against some of the defendants in this action and also against the Village.

29. Under the circumstances, it was and is impossible for the individual plaintiff to obtain a fair trial on any of the aforementioned charges within the Village.

30. Nevertheless, when the individual plaintiff was first brought to trial on some of those charges in the Village Court of the Village, defendants, through their attorneys, caused the application of

the individual plaintiff for a change of venue to be opposed vigorously, and such application was denied, and the individual plaintiff was tried, convicted and fined in the sum of $1,200.

31. At the present time, the individual plaintiff remains charged with violations of both of the aforementioned ordinances, and, on information and belief, in the absence of the declaratory and injunctive relief requested in this complaint, he will be brought to trial in the Village, convicted and fined for those remaining violations.

32. On information and belief, in the absence of the declaratory and injunctive relief requested in this complaint, the individual plaintiff will from time to time be charged with additional violations of the aforementioned ordinances, and will be tried, convicted and fined for such violations.

33. From the date the individual plaintiff was first charged with violations of the aforementioned ordinances, and solely as a result of those charges and the prosecution of the individual plaintiff thereunder, and because plaintiffs were thereby coerced into closing down their discotheque during the hours prescribed in the aforementioned ordinance limiting or purporting to limit the hours for the playing of music and dancing, and because plaintiffs have also been coerced on numerous occasions, even while their discotheque was open to the public, into re-adjusting the sound level of the music played for the benefit of their patrons, plaintiffs' discotheque has steadily lost patronage and income, and its profits have steadily declined to the point where in the last several months the discotheque has operated at a loss.

34. In addition to the aforementioned loss of profits, plaintiffs have necessarily been obliged to spend and have actually spent large sums of money for attorneys' fees and other expenses in the defense of the aforementioned charges brought against the individual plaintiff.

35. In the absence of the declaratory and injunctive relief requested in this complaint, plaintiffs will be forced to close down their discotheque permanently, at a tremendous loss to them and each of them.

36. In the respects hereinabove set forth, defendants and each of them have acted wilfully and maliciously, with the intent of closing down plaintiffs' discotheque permanently and otherwise discriminating against plaintiffs and depriving them of the equal protection of the laws and equal privileges and immunities thereunder, and with the knowledge that plaintiffs would thereby suffer irreparable damage.

37. By reason of the foregoing, plaintiffs have in fact been deprived of rights, privileges and immunities secured to them by the Constitution and laws of the United States, the equal protection of the laws and equal privileges and immunities thereunder, and they have suffered and will suffer irreparable damage for which there is no adequate remedy at law.

FOR A SECOND CAUSE OF ACTION

38. This cause of action arises under Article I, Sections 1, 6, 7, 8 and 11, of the Constitution of the State of New York, under Section 50 of the General Municipal Law of the State of New York and under the common law of that State.

39. Jurisdiction is conferred on this Court under the doctrine of pendent jurisdiction.

COMPLAINT

40. Plaintiffs repeat each and every allegation contained in paragraphs 3 to 37, inclusive, of this complaint, with the same force and effect as if fully set forth herein.

41. The aforementioned ordinance limiting or purporting to limit the hours for the playing of music and dancing violates the rights reserved to plaintiffs and others similarly situated under Article I, Sections 1, 6, 7, 8 and 11, of the Constitution of the State of New York for all of the reasons set forth in paragraph 21 of this complaint.

42. Defendants have caused the aforementioned ordinance limiting or purporting to limit the hours for the playing of music and dancing to be applied against plaintiffs in a manner that violates the rights reserved to plaintiffs under Article I, Sections 1, 6, 8 and 11, of the Constitution of the State of New York for all of the reasons set forth in paragraphs 22, 23 and 24 of this complaint.

43. The aforementioned ordinance prohibiting or purporting to prohibit noise violates the rights reserved to plaintiff and others similarly situated under Article I, Sections 1, 6, 7 and 8, of the Constitution of the State of New York for all of the reasons set forth in paragraph 25 of this complaint.

44. Defendants have caused the individual plaintiff to be prosecuted under both of the aforementioned ordinances in a manner that violates the rights reserved to him under Article I, Sections 1, 6 and 11, of the Constitution of the State of New York for all of the reasons set forth in paragraphs 26, 27, 28, 29 and 30 of this complaint.

45. Each plaintiff has duly made and served upon the defendants who are public officials a notice of claim relative to the acts and conspiracy that are the subject matter of this action pursuant to Section 50(e) of the General Municipal Law of the State of New York.

46. More than 30 days have elapsed since the service of such notices of claim, and adjustment or payment thereof has been neglected or refused.

Wherefore, plaintiffs request judgment as follows:

(a) Declaring the aforementioned ordinance limiting or purporting to limit the hours for the playing of music and dancing, which is set forth in Chapter 4, Section 10, Subdivision 5, of the Ordinances of the Village of Mamaroneck, to be in violation of both the Constitutions of the United States and of the State of New York;

(b) declaring the aforementioned ordinance prohibiting or purporting to prohibit noise, which is set forth in Chapter 4, Section 8, Subdivision 3(b), of the Ordinances of the Village of Mamaroneck, to be in violation of both the Constitutions of the United States and of the State of New York;

(c) enjoining, during the pendency of this action and permanently thereafter, defendants and each of them, and their respective agents, representatives and employees, from taking any action against plaintiffs or either of them or any other persons similarly situated under the aforementioned ordinances or either of them;

(d) awarding plaintiffs compensatory damages in the amount of One Million Six Hundred Thousand Dollars ($1,600,000);

(e) awarding plaintiffs punitive damages in the amount of

One Million Dollars ($1,000,000);

(f) awarding plaintiffs their costs and disbursements in this action, including their reasonable attorneys' fees; and

(g) granting plaintiffs such other and further relief as to this Court may seem just and proper.

Dated, New York, New York
July 1, 1975

BUTLER, JABLOW & GELLER
Attorneys for Plaintiffs

By _____
Stanley Geller
A Member of the Firm

Office and P. O. Address
400 Madison Avenue
New York, New York 10017
(212) 755-2040

AFFIDAVIT OF LOUIS C. FIELAND IN SUPPORT OF MOTION TO DISMISS COMPLAINT AS TO DEFENDANT EDITH SIDEMAN

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHARLES AKNIN and AKNIN CORPORATION,

Plaintiff,

-against-

ARTHUR PHILLIPS, JR., ARMAND GIANUNZIO, JOSEPH NATARO, DANIEL NATCHES, EMILIO A. DE D'BRAMO, [illegible] A. GRUSE, ANGELO C. MUSTICH, LOUIS LIFRIERI, THOMAS FORTE, MICHAEL ROTH, EDITH SIDEMAN, "JOHN DOE", "RICHARD ROE" and "THOMAS HOE",

Defendants.

Civil Action
File No. 75/3231
(C.L.B.)

AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

LOUIS C. FIELAND, being duly sworn, deposes and says:

I am of counsel to Zimmer, Fishbach & Hertan, attorneys for the defendant, Edith Sideman, herein. This affidavit is submitted in support of that defendant's motion to dismiss the complaint herein for failure to state a claim, pursuant to Rule 12 of the Federal Rules of Civil Procedure, and for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. This affidavit is submitted by counsel rather than by the defendant because the instant motion essentially involves an issue of law only.

The complaint herein contains two causes of action. The first cause of action "is for declaratory and injunctive relief and also for money damages and arises under the First, Fifth and Fourteenth Amendments to the Constitution of the United States and under Sections 1983 and 1985 of Title 42 of the United States Code."

The second cause of action does not clearly indicate the relief sought under that particular count. However, paragraph "38" of the complaint states:

> "38. This cause of action arises under Article I, Sections 1, 6, 7, 8 and 11, of the Constitution of the State of New York, under Section 50 of the General Municipal Law of the State of New York and under the common law of that State." (Emphasis ours)

The only place where the defendant, Edith Sideman's name is mentioned in the complaint is in paragraph "5" wherein it is alleged: "defendant Edith Sideman was and now is a resident of the Village".

As a resident only, it is difficult to conceive how the defendant, Edith Sideman, can be involved in a cause of action arising under the Constitution of the United States or of a violation of any state or federal law by public officials or by any public law being in conflict with any constitutional provision, either federal or state.

It is undoubtedly true that in paragraph "11" of the complaint, the plaintiff alleges:

> "11. Accordingly, some of the residents, including those who are defendants in this action, began to exert pressure on the defendants who are public officials to do whatever the latter could to close down plaintiff's discotheque,and such pressure gave rise to the illegal and unconstitutional conspiracy and acts hereinafter set forth."

However, it is apparent that any resident has a right, and even a constitutional right, to "exert pressure" on any public official provided, of course, that such pressure is not exerted in any illegal manner. Obviously, the foregoing quoted extract from the complaint makes no such allegation. Further, the allegation that "such pressure gave rise to the illegal and unconstitutional conspiracy and acts hereinafter set forth" adds no legal substance to the complaint. In civil law, a "conspiracy" is no independent wrong; it is in ultimate effect a rule of evidence (Donovan v. Board of Elections of Nassau County, 67 Misc. 2d 460, 324 N.Y.S.2d 628,631).

AFFIDAVIT OF LOUIS C. FIELAND IN SUPPORT OF MOTION TO DISMISS COMPLAINT AS TO DEFENDANT EDITH SIDEMAN

The instant motion should be granted in all respects. The complaint should be dismissed and summary judgment should be granted in favor of the defendant and against the plaintiff.

Louis C. Fieland

LOUIS C. FIELAND

Sworn to before me this
16th day of September 1975.

Muriel Colligan

MURIEL COLLIGAN
Notary Public, State of New York
No. 41-5761555
Qualified in Queens County
Commission Expires March 30, 1976

AFFIDAVIT OF CHARLES AKNIN IN OPPOSITION TO MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHARLES AKNIN and AKNIN CORPORATION, Plaintiffs, -against- ARTHUR PHILLIPS, JR., ARMAND GIANUNZIO, JOSEPH NATARO, DANIEL NATCHES, EMILIO A. DE D'BRAMO, HENRY A. GRUSE, ANGELO C. MUSTICH, LOUIS LIFRIERI, THOMAS FORTE, MICHAEL ROTH, EDITH SIDEMAN, "JOHN DOE", "RICHARD ROE" and "THOMAS HOE", Defendants.	75 Civ. 3231 (CLB) AFFIDAVIT IN OPPOSITION

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

CHARLES AKNIN, being duly sworn, deposes and says as follows:

1. I am the individual plaintiff in this action. I submit this affidavit in opposition to the motion of defendant Edith Sideman for an order pursuant to Rules 12 and 56 of the Federal Rules of Civil Procedure, dismissing the complaint herein as against that defendant for alleged failure to state a claim upon which relief can be granted and for summary judgment in favor of the aforementioned defendant.

2. At the beginning of 1974, through the plaintiff corporation, of which I am the president and one of the two chief stockholders, my wife being the other stockholder, I was operating a French restaurant on East Post Road in the Village of Mamaroneck. Because of the gasoline

shortage, the rising prices of food and other unfavorable conditions, I decided to terminate the restaurant business and open a discotheque. Accordingly, I arranged to have alteration plans prepared and filed with the Building Department of the Village of Mamaroneck, and, when those plans were approved and a building permit had been issued to my corporation, I arranged for the conversion of the premises from restaurant to discotheque. The alterations were completed according to the plans, and they were approved, and a new certificate of occupancy was issued for the premises.

3. The discotheque opened in April 1974, and was an immediate success. In the first two months in which it was in operation, it earned a net profit of approximately $3,500 per week. On the other hand, it attracted a relatively young group of people, who were different in many ways from the residents of the area in which it was located.* Moreover, although the area is zoned for use for commercial purposes, it is on the border line of a residential area. Some of the residents, therefore, took offense at the operation of the discotheque in their neighborhood, and they were particularly troubled by some of the activities of the customers of the discotheque when, in the early hours of the morning, the latter left that establishment. Of course, I have no way of controlling the activities of customers once they leave my place of business.

4. In any event, the residents, who include Mrs. Sideman and such influential people as defendant Michael Roth, the Chairman of the State Liquor Authority, began exerting pressure on the officials of the Village to take action that would result in closing down the discotheque, which is to say they started the conspiracy alleged in the complaint. In some ways, they were quite open about it. They held, or caused the

*The majority of the discotheque's customers have been black and hispanic.

officials of the Village to hold, public meetings at which they demanded to know what the officials were doing about the discotheque, and the officials, led by the Mayor, responded that they were doing everything that they could do, and they urged the residents to cooperate with them. There obviously were also many private meetings at which the residents, or their ringleaders, including Mrs. Sideman, conspired more effectively, by devising the forms of harassment that they subsequently practiced at my expense.

5. The conspirators at first complained that customers of the discotheque were blocking their driveways and otherwise violating local parking ordinances. To satisfy them in this respect, I arranged meetings with the Mayor and other officials of the Village, and I conceived a plan by which I would arrange to lease offstreet space for parking. I entered into a lease with the landlord of a nearby A & P supermarket under which the discotheque's customers would have been able to use at night the parking space that the supermarket's customers used during the day. No sooner had I done so, however, when the conspirators, presumably disturbed about the allegedly illegal parking proclivities of the discotheque's customers, exerted sufficient pressure on the landlord to terminate the lease! I am informed and I believe that Mrs. Sideman was one of the persons who participated in this improper and illegal interference in the contractual relations between my corporation and the landlord, among other ways by signing a petition addressed to the landlord.

6. Even while I was solving, or at least attempting to solve the parking problem, the conspirators moved against me more directly. In mid-June, 1974, although the alteration plans I had caused to be filed

for the discotheque had long since been approved by the Village, and a certificate of occupancy had long since been issued for the premises, I was visited by officials of the State Department of Labor, who quite obviously had been persuaded by the conspirators to come to their aid. The State officials served me with a notice of violation of the Labor Law in respect of fire exits, of which they claimed the discotheque had an insufficient number. Significantly, they gave me 30 days to cure the violation, but they did not require me to close down the discotheque during that period.

7. On July 2, 1974, however, the Village Building Department issued an order directing me to close down the discotheque while I was installing the exits required by the State Labor Department! The Village order came at a particularly inopportune time, as the conspirators well knew, because of the forthcoming July 4th weekend, when I expected to do more business in the discotheque than I had ever done before. I was, therefore, reluctant to shut down the discotheque, and, when I failed to do so, I was served with a summons (and subsequently, when my attorney inadvertently failed to appear in court, I was arrested) for violation of the Village order. Almost immediately after the July 4th weekend, however, I did in fact shut down the discotheque, and I kept it closed until the additional exits required by the State Department of Labor had been installed and approved by that authority. Several months later, and after a considerable expense in the way of legal fees and related disbursements, I was acquitted of the charge in the summons served upon me by the Village, which was for allegedly maintaining a criminal nuisance. This was only the first of several improper charges of which I have been acquitted in the past, and I shall be acquitted in the future.

8. It was thereafter that the conspirators, and particularly Mrs. Sideman, conceived of the means by which they ultimately forced me to shut down the discotheque permanently. They invoked two Village ordinances, which they knew to be unconstitutional, and, as if that were not improper enough, they invoked the two ordinances in an unconstitutional manner. The first of those ordinances is one which purports to require "cabarets" to obtain a license in order to operate, and restricts such establishments from playing any music or permitting dancing after 1:00 a.m. on weekday mornings and after 2:00 a.m. on Sunday and holiday mornings. The second ordinance, a so-called "anti-noise ordinance" makes it illegal for any person to cause a noise to be made on his premises which is "unusual" or "unnecessary" or can be heard at a distance of more than 100 feet from the premises. According to the information I and my attorneys have been able to gather, and there has been no contrary information, what I shall hereinafter call the "cabaret ordinance" had not, prior to the time it was invoked against me, been invoked against any "cabaret" almost from the date of its inception, which I believe was during the Prohibition era. Its use against me, therefore, was a clear case of selective prosecution. Moreover, at the time I was served with the first three summonses for violation of this particular ordinance, there were at least two other "cabarets" in the Village of Mamaroneck which were violating the statute, openly and with impunity.

9. Nevertheless, in mid-July, 1974, I was served with the first of many summonses under the "cabaret ordinance," and I was convicted on those first summonses and fined. The convictions are now on appeal to the County Court of Westchester County, where I am confident that they will be reversed, and it is not from those convictions that I seek

relief in this Court. The other plaintiff, my corporation, certainly does not seek any such relief, since it was not even a party to the convictions in Village Court. More critical is the fact that there are a substantial number of summonses under the "cabaret ordinance" still outstanding against me, and, more than anything else, it has been the improper and illegal use of this invalid ordinance that has forced me to close down the discotheque.

10. After receiving several successive sets of summonses under the "cabaret ordinance," I was, as a practical matter, obliged to limit the hours of operation of the discotheque to those set forth in the ordinance. A discotheque, however, does not begin to get busy until about midnight. It can, therefore hardly be successful if it must shut down at 1:00 a.m. on weekday mornings and 2:00 a.m. on Sundays and holidays. The discotheque on East Post Road was no exception. Under the new hours it began to lose customers until it no longer operated at a profit, and several weeks ago, I "cut" the losses of my corporation by assigning the balance of the lease to the premises to a third party corporation. Thus ended a business which was capable of earning a net profit of $175,000 per year!

11. Mrs. Sideman's role in persuading the Village officials to invoke the "cabaret ordinance" against me was perhaps no greater than that of any of the other non-official members of the conspiracy. She played the leading role, however, in the use of the "unnecessary noise ordinance." Beginning in July, 1974, I was served with the first of many summonses under that ordinance, and to my knowledge every single one of those summonses was issued on the complaint of Mrs. Side-

man, whenever she took it into her head to harass me or she was prompted to do so by another member of the conspiracy.

12. I was convicted under some of these summonses at the same time that I was convicted under the summonses for violation of the "cabaret statute," and some of the summons under the "unnecessary noise" statute are also still outstanding. They, or the threat of them, however, have had an effect on the business of the discotheque only slightly less devastating than the summonses under the "cabaret ordinance." What happened was that a police officer would insist that I lower the volume of the music in the discotheque, either in connection with the issuance of a summons or under the threat of one, whereupon I would proceed to make one or more adjustments in the volume which would inevitably anger and alienate an additional number of the customers of the discotheque. Of course, all of these adjustments were at the whim of the officer (subject, of course, to the whim of Mrs. Sideman), since, after all, who can determine what is an "unnecessary noise."

13. The Village officials were well aware of the fact that the "unnecessary noise ordinance" was unconstitutional. I am informed that the very court that convicted me under the ordinance, the Village Court of the Village of Mamaroneck, had previously handed down a decision in a case entitled "People v. Daley" in which it had directed a dismissal of the summons issued against defendant Daley under the same ordinance, with the comment that the ordinance "would seem to be of doubtful validity."

14. I am obliged also to add that, in addition to being deprived of a business that earned $175,000 per year, my corporation has

been forced thus far to spend over $20,000 in legal fees in defending both itself and me in various proceedings, and I have to date been fined $1,200.

15. Mrs. Sideman, therefore, has been one of the leading members of a conspiracy that has wilfully, deliberately and wrongfully put me and my corporation out of business. She has not, as she now suggests, merely tried to persuade public officials to do their duty; rather, she has tried to make, and has succeeded in making, those officials ignore their duty to administer the (valid) laws fairly and evenly and without discrimination. She has not merely sought to regulate a "cabaret," or to prevent "unnecessary noise," if such can be done under the Constitution of this country and this State; she has sought, and has been ultimately able, to put a particular "cabaret" out of business permanently, because, although it was operating in a proper zone and in accordance with all valid laws, it attracted people who were slightly different and, to her, somewhat disagreeable. Moreover, she fully well knew what she was doing; she and the other residents who were members of the conspiracy were repeatedly told by the officials of the Village that they could not legally end a business in that way, but she insisted that they find a way, any way. And they did. In brief, Mrs. Sideman has done everything she could do, and it has proved to be more than enough, to prevent me from earning a living in a perfectly legal way and to deprive my corporation of exceedingly valuable property, in each instance without the slightest (no less "just") compensation and in violation of every principle of due process of law.

16. In light of the foregoing, I respectfully submit that the

present motion should be denied in all respects.

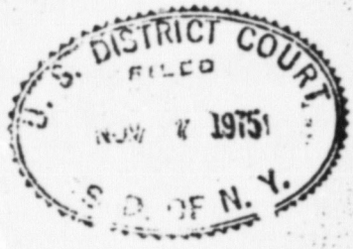
CHARLES AKNIN

Sworn to before me this

21st day of October, 1975

STANLEY GELLER
NOTARY PUBLIC, State of New York
No. 31-6484585
Qualified in New York County
Commission Expires March 30, 1976

Memo Decision



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHARLES AKNIN and AKNIN CORPORATION,

Plaintiffs,

-against-

ARTHUR PHILLIPS, JR., ARMAND GIANUNZIO, JOSEPH NATARO, DANIEL NATCHES, EMILIO A. DE D'BRAMO, HENRY A. GRUSE, ANGELO C. MUSTICH, LOUIS LIFRIERI, THOMAS FORTE, MICHAEL ROTH, EDITH SIDEMAN, "JOHN DOE", RICHARD ROE", and "THOMAS HOE",

Defendants.

75 Civ. 3231-CLB

MEMORANDUM

#43368

Brieant, J.

By their complaint, filed July 1, 1975, plaintiffs seek declaratory and injunctive relief and also money damages. Their first pleaded claim "arises under the First, Fifth and Fourteenth Amendments to the Constitution of the United States, and §§ 1983 and 1985 of Title 42, U.S.C." The second claim is pendent, pleaded in reliance upon the Constitution of the State of New York and various New York statutes.

Plaintiff Charles Aknin is President, and together with his wife, shareholder of plaintiff Aknin Corporation, a New York

corporation. Defendant Phillips, Gianunzio, Nataro, Natches, De D'Bramo, Mustich, Lifrieri and Forte are officials of the Village of Mamaroneck, Westchester County, New York. Defendants Michael Roth and Edith Sideman are not sued in any official capacity, and Edith Sideman has none, being a housewife and resident of the Village of Mamaroneck. We are told that Roth holds a state office as Chairman of the Liquor Authority, although the complaint does not so allege.

By motion fully submitted on October 22, 1975, defendant Edith Sideman has moved for an order dismissing the complaint as to her pursuant to Rule 12 for failure to state a claim or alternatively, for summary judgment pursuant to Rule 56, F.R.Civ.P.

The complaint, affidavit of plaintiff read in opposition to this motion and filed papers show that plaintiff operated a highly respected French Restaurant, known for many years as "Charles V," located in a converted residence at 5121 East Post Road in the Village of Mamaroneck, that being a through or main artery. Early in 1974, the restaurant closed because of the gasoline shortage, and plaintiffs converted their premises to a "discotheque" which was opened for business in April, 1974 under the name "Zazou."

We are told without contradiction that Zazou was an immediate financial success, that because of the nature of the entertainment furnished there, it earned profits at the rate of $175,000.00 per year and attracted a clientele, the majority of whom are said to be "black and hispanic."

Implicit in ¶3, et seq. of Mr. Aknin's affidavit is the fact that the discotheque was in full operation in the early hours of the morning. Although located in an area zoned for commercial use, it lies on the borderline of a residential area in which defendant Sideman lives. Plaintiff tells us that some of the residents of the neighboring residential area backing up to this principal highway in Mamaroneck "took offense at the operation of the discotheque in their neighborhood, and they were particularly troubled by some of the activities of the customers of the discotheque when, in the early hours of the morning, the latter left that establishment." Since we assume that in the early hours of the morning in Mamaroneck, New York the good burghers are sleeping, and readying themselves for their contest with the Penn Central commuter trains on the following day, we assume that this resentment was a natural and reasonable outgrowth of the noise and related activities of the revelers attending the discotheque, and that their ethnicity is

of no particular relevance.

The complaint alleges that the defendants, together with those ubiquitious malefactors John Doe, Richard Roe and Thomas Hoe, conspired with each other, and with the Village fathers to take action to "close down plaintiff's discotheque and otherwise deprive plaintiff of rights, privileges and immunities secured to them by the Constitution and laws of the United States;" (Complaint, ¶4), that is, to cause the gathering at early hours, of large numbers of noisy and disruptive persons who would be expected to affect the neighborhood tranquility.

It was suggested at the oral argument of this motion, and is taken as true, that defendant Sideman and others approached the Village officials and protested the operations of the discotheque. They did this openly. They held, or caused the Village officials to hold public meetings at which they demanded to know what the officials were doing about the discotheque.

Initially, it appeared that customers of the discotheque were blocking the private driveways of neighbors, and otherwise violating local parking ordinances. Plaintiff Aknin says he leased the A & P Supermarket parking lot for use after store hours, so that

this admitted violation would be abated, and thereafter, the defendant Sideman and others signed a petition addressed to the landlord, asking that the landlord (whose local supermarket seeks neighborhood patronage), not assist the operation of the discotheque by permitting it to use the off-street parking facilities in the evening. As might be expected, the A & P heeded its customers.

Thereafter, it appeared the conspirators induced officials of the New York State Department of Labor, not sued here, to serve a notice of violation of the Labor Law in respect of fire exits, of which Zazou had an admittedly insufficient number. That Department posted a violation, allowing 30 days for the installation of additional exits. The conspirators persuaded the Village Building Department to issue an order revoking the certificate of occupancy, and directing a closing down of this place of public assembly until the exits were installed as required by the State Labor Department. This was done on the eve of the July 4th weekend, at which time it was admitted that there would probably be a substantial crowd in attendance at the discotheque. For failing to close Zazou pursuant to the Village order, the Village officials caused Aknin to be arrested and charged. Thereafter, following the weekend, he did

close until he had complied with the State Labor Department order. He was acquitted. Citizens, however officious they may seem, have a right to urge their officials to enforce the fire laws.

It also appears that the Village of Mamaroneck had a cabaret ordinance restricting the playing of music or dancing after 1:00 A.M. on weekday mornings and after 2:00 A.M. on Sunday and holiday mornings, and also had an anti-noise ordinance. These are ancient laws which plaintiffs suggest, and the Court recognizes, were initially conceived during the era of National Prohibition, when "cabarets" and "speakeasies" tended to proliferate on main highways in Westchester County, producing the same annoyances complained of by Sideman.

In mid-July 1974 plaintiff was convicted of violating these ordinances, and his convictions are now on appeal to the County Court of Westchester County where he is "confident that they will be reversed." (Affidavit of Charles Aknin, ¶9).

Plaintiff Aknin asserts (Affidavit, ¶9), that the improper and illegal use of these invalid ordinances has forced a closing of the discotheque. This was because, as a practical matter, he was obliged to limit the hours of operation to those set forth in the

cabaret ordinance, and closure at such hours does not suit his customers.

It is alleged, and we assume, that Mrs. Sideman, together with her conspirators, persuaded the defendant Village officials to invoke the cabaret ordinance against plaintiffs, and likewise the unnecessary noise ordinance. It is claimed that the Village officials who responded to wishes of their electorate were well aware of the fact that the unnecessary noise ordinance was facially unconstitutional for vagueness, and that enforcement of the cabaret closing hours was selective, saloons having more discreet patrons being allowed to remain open so long as there was no neighborhood outcry.

The "blessings of quiet seclusion" have been held to be a permissible goal of local government. Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974). Mrs. Sideman and her neighbors, Doe, Roe and Hoe enjoy First Amendment rights. They are entitled to speak, and even to speak sharply, to their elected representatives concerning these goals. When they assemble at public hearings and request the local officials to "do something" about the discotheque, it will be presumed that they intend something lawful be done. Village officials are expected to resist any improper suggestions, and

avoid use of improper means.

If, arguendo, the Village officials then do something unlawful [but Cf. Brault v. Town of Milton, No. 74-2370 (2d Cir. Oct. 1, 1975) (en banc)], we see no basis for a claim against the citizens who demanded the lawful municipal action. To permit maintenance of this type of civil rights lawsuit against a private individual would under the circumstances and uncontested facts shown in this case, have an unfortunate and unjust chilling effect upon the exercise by members of the public of their First Amendment right to complain about a public nuisance.

There is no contested issue of fact; summary judgment is granted to defendant Sideman only, pursuant to Rule 56, F.R.Civ.P., and the complaint is dismissed as to defendant Sideman and her co-defendants, Doe, Roe and Hoe, only, and the caption of the action is amended to remove their names.

The Court also agrees with the contention advanced by Mrs. Sideman that she should not be held in the case while it takes its course as to the other parties. The burden of litigation and the legal expenses attendant thereon, would also exert a chilling effect upon the citizens of the Village in their exercise of First

Amendment rights, and their important right to petition local government for the redress of real or fancied grievances. Accordingly, I find there is no just cause for delay pursuant to Rule 54(b), F.R.Civ.P., and that a final judgment should be filed at this time as to Sideman and her fellow citizens Doe, Roe and Hoe.

Nothing herein should be taken as suggesting plaintiffs have stated a claim upon which this Court will grant equitable and declaratory relief as against the remaining defendants. The parties have not briefed and the Court has not considered the applicability of the doctrine of abstention enunciated in Younger v. Harris, 401 U.S. 37 (1971) and Samuels v. Mackell, 401 U.S. 66 (1971).

Counsel for Mrs. Sideman shall settle a final judgment on five (5) days notice.

Dated: New York, New York
November 7, 1975

CHARLES L. BRIEANT, JR.

CHARLES L. BRIEANT, JR.
U. S. D. J.

AFFIDAVIT OF STANLEY GELLER
IN SUPPORT OF PLAINTIFFS'
MOTION TO REARGUE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

CHARLES AKNIN and AKNIN CORPORATION,

Plaintiffs,

-against-

ARTHUR PHILLIPS, JR., ARMAND GIANUNZIO, JOSEPH NATARO, DANIEL NATCHES, EMILIO A. DE D'BRAMO, HENRY A. GRUSE, ANGELO C. MUSTICH, LOUIS LIFRIERI, THOMAS FORTE, MICHAEL ROTH, EDITH SIDEMAN, "JOHN DOE", "RICHARD ROE" and "THOMAS HOE",

Defendants.

AFFIDAVIT IN SUPPORT OF MOTION

- -x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

STANLEY GELLER, being duly sworn, deposes and says as follows:

1. I am a member of the firm of Butler, Jablow & Geller, attorneys for plaintiffs in this action. I make this affidavit in support of plaintiff's motion for a rehearing of defendant Sideman's motion for summary judgment, which was previously granted by the Court in a memorandum decision filed November 7, 1975.

2. I respectfully submit that in its original determination the Court overlooked salient facts and points of law. Specifically, I respectfully submit that the Court failed to recognize the existence in this case of a question of fact relating to the good faith and lack of malice of defendant Sideman, the central question in cases of malicious

or selective prosecution.

3. To begin with, I respectfully submit that the Court made several assumptions of fact which are unwarranted by the limited record. The first assumption is that the defendant Sideman's conduct "was a natural and reasonable outgrowth of the noise and related activities of the revelers attending the discotheque and that their ethnicity is of no particular relevance." This assumption is contrary to the allegations of the complaint, to the statements in plaintiff Aknin's affidavit in opposition to defendant Sideman's motion and to statements in my oral argument before the Court in opposition to the motion. Plaintiffs have expressly taken the position that the primary, if not the sole, reason for the conduct of defendant Sideman and the other residents of the area in which plaintiffs' discotheque is located was the fact that the residents resented the patrons of plaintiffs' discotheque because of their age, social and economic group (Compl., para. 10). More particularly, in plaintiff Aknin's previous affidavit, he pointed out that the majority of the patrons were young blacks and Spanish-speaking individuals (Aff., footnote, p. 2). In my oral argument to the Court, I noted that one of the tactics adopted by the residents of the area was to stand in front of plaintiffs' discotheque and to shout epithets at the patrons while the latter entered and left the discotheque.

4. Moreover, although plaintiffs' discotheque borders on a residential area, it is not that close to a sufficient number of residences to make noise emanating from it a reason for the passion that its presence aroused in the community. The discotheque has its front on East Boston Post Road, where, in the immediate vicinity there are

no residences. Across the Post Road is Main Street and business and commercial establishments. Behind the discotheque is a tennis club that takes up a considerable area.

5. As plaintiff Aknin pointed out in his previous affidavit, the residents of the Village initially focused their attention on the alleged "parking problem." It is well known, that the traditional way to keep "outsiders" out of a local area is to prevent them from parking their cars there. In this case, therefore, the residents, whose real desire was to keep the patrons of plaintiffs' discotheque out of the area, followed the traditional pattern by demanding that the police keep the patrons' cars off the streets in the vicinity of the discotheque.

6. This was made particularly clear by the "solution" that was considered by the residents and the public officials, at meetings called for that purpose. The "solution" was a temporary general ban of all parking in the area. I quote from the Village newspaper, the "Daily Times" of July 9, 1974, reporting on a meeting held the night before:

> "Responding to other questions, [defendant Village Police Chief] Lifrieri said that the village could not impose a temporary emergency parking ban, like a snow ban [it was the middle of the summer!], and reiterated that the only way to get the cars out of the neighborhood is through a total ban and towaway procedure."

7. In other words, and this point, which this Court appears to have overlooked, is critical -- the initiative for this bogus "solution" to a bogus "parking problem," came not from the public officials, but from the residents. At first, the public officials resisted

the residents' clear wish to apply the law -- in this instance, Village ordinances -- in an all too obviously discriminatory way.

8. When faced with the initially proper reaction of defendant Lifrieri, however, the residents quickly backed off. They did not wish the law to be applied indiscriminately, and now I refer specifically to defendant Sideman. Again I quote from the "Daily Times," this time from the issue of August 8, 1974, reporting on an "informal" meeting of residents and public officials on the prior evening:

> "A few residents spoke in favor of restricted parking but a majority supported Alred [Alfred] J. Sideman, 520 Greenhaven Road, who said his family owns four cars with parking for only three therefore one car has to be left on the street.
>
> "Sideman proposed that the village deed the street to the residents to be maintained as a private road, but [defendant Village Mayor] Phillips said there is little likelihood that the state would approve that action."

9. Here it is specifically the Sidemans who are proposing a bogus "solution" to the bogus "parking problem," and defendant Mayor Phillips is counselling against it. I am constrained to note that the "private street" solution to get rid of plaintiffs' patrons is hardly different in kind from the "private school" solution by which Southern citizens have been attempting to evade the law of the land as laid down in Brown v. Board of Education, 347 U.S. 483 (1954).

10. Defendant Sideman was not entirely unsuccessful in her first effort to have the law applied in a discriminatory way. As indicated in the "Daily Times" article of August 22, 1974, her residence is on Greenhaven Road. Apparently, in the summer of 1974, there was

a Village parking ordinance relating to that road. It was not enforced, however, because the aforementioned tennis club is also on that road, and the members of the club use the road to park their cars, and the presence of the tennis players is not resented by the residents. The situation changed dramatically after the advent of plaintiffs' discotheque, when the patrons of the discotheque tried to use the road to park their cars. The "Daily Times," May 22, 1975:

> "Police Lt. William Paonsassa, who sits with the [Village of Mamaroneck] traffic commission as an advisor, said the regulation prohibiting parking on both sides of Greenhaven Road was instituted before the controversy arose over the discotheque. Leniency was shown to tennis players who parked at the courts, however, until last summer when debate over parking by Zazou [plaintiffs' discotheque] patrons became heated."

I respectfully submit it would be difficult to find a more clear cut admission of discriminatory enforcement of the law.

11. The utter hypocrisy of the "parking problem" approach, however, was revealed in the A&P episode described in plaintiff Aknin's previous affidavit. When, in his innocence concerning the real motive of defendant Sideman and her fellow residents, Aknin came up with a solution that would truly keep the cars of plaintiffs' patrons off the streets (but not out of the area), by arranging a lease with the A&P's landlord, under which plaintiffs' patrons could park in the supermarket's parking space, the residents forced the landlord to cancel that lease, immediately after he had made it. The "Daily Times," August 22, 1975:

> "The Village Board acknowledged receipt of a petition signed by 119 A&P neighbors demanding that parking in the supermarket lot be 'stopped immediately' and expressing concern that Zazou [plaintiffs' discotheque] traffic might endanger children in the area when school reopens in the fall."

Quite obviously, plaintiffs' discotheque has never been open for business at any time when children are going to or coming from school!

12. In brief, this Court's picture of the residents, and particularly of defendant Sideman, as, in this instance, simple, honest folk who were merely petitioning their public officials to do something lawful in the premises is contrary to the actual facts. They repeatedly suggested that their officials take the most brazenly discriminatory and selective action with one purpose: not to correct any improper activities committed by individuals among plaintiffs' patrons, but to put plaintiffs out of business. They cannot now recoil, as if in horror, at what they pushed their elected officials into doing -- almost, it would seem, against the latters' will, and surely against their better judgment.

13. Before leaving this history of the bogus "parking problem," I respectfully point out to this Court that this is not a zoning case, as the Court suggested in its memorandum decision by referring to Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974). It is a subversion of the principles of zoning law. In this instance, the residents persuaded their public officials to drive plaintiffs out of an area in which plaintiffs had every right to be under the local zoning law, and the residents were well aware of that fact. They were expressly advised of it by their public officials at more than one meeting. Once again, the "Daily Times," August 22, 1974:

> "The officials said Aknin has complied with all village and state regulations regarding the operation of his establishment, ..."

14. It was while the bogus "parking problem" was being

discussed by the residents and public officials that the procedures to close down plaintiffs' discotheque were worked out, the use of the "cabaret" ordinance and the "unnecessary noise" ordinance. Those procedures, however, were not discussed at the open meetings, and the discussions concerning them are not reported in the "Daily Times." That does not mean, however, as this Court suggested in its memorandum decision, that there were no "closed" or clandestine meetings between the ringleaders among the residents and the public officials. We know that defendant Sideman was in constant communication with the Village police, if not with other Village officials, with respect to action under the "unnecessary noise" ordinance. Plaintiff Aknin stated in his previous memorandum that Mrs. Sideman was behind every summons issued against him under the ordinance, and she did not challenge that. She cannot do so, since her part in these summonses is a matter of record. Thus, the "Daily Times," May 19, 1975:

> "A summons citing violation of the village noise ordinance at the Zazou discotheque, 1521 E. Post Road, Mamaroneck, was refused early this morning by the owner, Charles Aknin, and the information was turned over to Mamaroneck Village Court.
>
> "Ptl. Fred Daly, responding to a complaint shortly after midnight from Edith Sideman, 520 Greenhaven Road, went to that address where he reported hearing music coming from the discotheque, a distance greater than the permitted 100 feet.
>
> "Aknin, approached at the discotheque, refused a summons and insisted on returning with the patrolman to the Greenhaven Road location, at which time the music was no longer audible, Daly said. On a written complaint from Mrs. Sideman, Daly again attempted to serve the summons and Aknin again refused it, the patrolman said."

15. I respectfully ask this Court to note the date of this particular incident -- May 19, 1975. This was one of the later summonses

one issued well after plaintiffs' attorney had appeared in the Village Court and pointed out that the "unnecessary noise" ordinance was unconstitutional, and had been all but found to be so in a prior decision of the Village Court in the Daley case (referred to in plaintiff Aknin's previous affidavit). I should also note here that a substantially identical ordinance was flatly held to be unconstitutional by the State Supreme Court, Suffolk County, in Village of Southhampton v. Tekworth, 69 Misc.2d 291 (1972).

16. Under these circumstances, I respectfully submit that, especially at this stage of this action, when plaintiffs have not yet had the opportunity to depose any adverse parties or witnesses, it is reasonable to infer that, certainly after a specified date, and even before then (in the course of her many conversations with the Village police), defendant Sideman shared the knowledge of the Village officials that the "unnecessary noise" ordinance was unconstitutional. Yet she continued to charge plaintiffs with violations of that ordinance and to persuade the Village officials to act upon her charges.

17. This leads to what I respectfully consider to be the critical point of law that the Court overlooked in its memorandum decision. The Court is prepared to assume and does assume, that defendant Sideman and some of her fellow residents "persuaded the defendant Village officials to invoke the cabaret ordinance against plaintiffs, and likewise the unnecessary noise ordinance." Accepting that assumption, I respectfully submit it follows that the motion for summary judgment must be denied on the basis of hornbook law on malicious prosecution.

18. It is well-established that a private individual is guilty of malicious prosecution if he or she knows that another person did not commit an act which is a crime under the law, but, nevertheless, persuades a public official to prosecute for that alleged act. It is not, and never has been, an answer that the public official should not have prosecuted. If the public official also knew that the person charged did not commit the act charged, that would make the public official guilty of malicious prosecution; it would not exculpate the private individual who had persuaded him to prosecute. And this would be so even though it could be argued that the public official should have, and certainly could have, refused to prosecute.

19. I now respectfully ask the Court to suppose that a private individual knows that an ordinance is unconstitutional, or that the enforcement of the ordinance would be unconstitutional because it would constitute selective prosecution, but, nevertheless, persuades a public official to prosecute thereunder. Is there any more reason why the willingness of the public official to prosecute under those circumstances should exculpate the private individual than in the prior example? I respectfully submit that there is not the slightest difference. In the one instance the private individual persuades a public official to act upon a false set of facts; in the other, upon an invalid set of ordinances, one of which -- even if it were valid on its face -- could not have been validly invoked under the rule of law prohibiting selective prosecution.

20. The Court's reference to the normal First Amendment right of an American citizen to petition his or her elected official for

redress of grievances has no application -- and never has had -- to cases of malicious or selective prosecution. If it did, there would never be a case of malicious prosecution. The simple point is that the First Amendment was never intended, and has never been properly applied, to a private individual who knowingly persuades his or her elected officials to act in violation of the law. Such interplay between private individual and public official has nothing to do with redress of grievances; rather, it is a subversion of the right thereto against all due process.

21. This Court has assumed that defendant Sideman and her fellow residents who are referred to in the complaint as "John Doe", "Richard Roe" and "Thomas Hoe" were seeking only the proper application of valid laws to protect themselves from the unlawful acts of other citizens. Plaintiffs say that there is at least a question that defendant Sideman and her fellow residents were in fact knowingly engaged in a process more closely akin to mob rule and lynch law in derogation of the rights of other citizens. That simple, but critical issue is the mixed question of fact and law at the heart of every case of malicious and selective prosecution whether brought under the Civil Rights Acts or under some other authority. What this Court has done in this case, I respectfully submit is to decide the question in defendants' favor, on papers before plaintiffs have had the opportunity to depose any party or witness.

22. The court in its memorandum decision referred to Brault v. Town of Milton, No. 74-2370 (2d Cir. Oct. 1, 1975). That case was decided by the full bench of the Court of Appeals primarily on

the issue of malice -- i.e., whether or not the officials of the Town of Milton not only proceeded under a law which they knew to be unconstitutional, but did so for some ulterior motive, such as to put Mr. Brault out of business. I respectfully submit that that question of malice, which so concerned the full bench in Brault is the very question that this Court has decided summarily in favor of defendant Sideman.

23. Even more to the point than Brault is Heyman v. Commerce and Industry Insurance Company, No. 75-7230 (2d Cir. Oct. 24, 1975), decided by the Court of Appeals three weeks after the Brault case. In Heyman, the Court of Appeals reversed a summary judgment where the issue was also one relating to the state of mind of the defendant -- in that instance, the intention of the defendant concerning a part of an insurance agreement. Speaking for the Court of Appeals, Chief Judge Kaufman emphasized that "when the [district] court considers a motion for summary judgment, it must resolve all ambiguities and draw all reasonable inferences in favor of the party against whom summary judgment is sought." Given the background of this case, the documented history of the bogus "parking problem" and the manner in which defendant Sideman and her fellow residents repeatedly tried to persuade their elected officials to apply the law in an unlawful way, and, lastly, defendant Sideman's close participation with the elected officials in the prosecution of plaintiffs under the "unnecessary noise" ordinance, it is a reasonable inference that she not only was among those who persuaded the officials to act, but that she did so knowing that they would act unlawfully and that she encouraged them to do so.

AFFIDAVIT OF STANLEY GELLER
IN SUPPORT OF PLAINTIFFS'
MOTION TO REARGUE

24. In light of the foregoing, I respectfully request this Court to grant a rehearing of defendant Sideman's motion for summary judgment, and upon such rehearing, to reverse itself and to deny that motion in its entirety.

Stanley Geller
STANLEY GELLER

Sworn to before me this

17th day of November, 1975

Richard A. Whitney

RICHARD A. WHITNEY
Notary Public, State of New York
No. 31-4254225
Qualified in New York County
Commission Expires March 30, 1977

AFFIDAVIT OF LOUIS C. FIELAND IN OPPOSITION TO PLAINTIFFS' MOTION TO REARGUE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHARLES AKNIN and AKNIN CORPORATION,	:	
Plaintiffs,	:	Civil Action File No.
-against-	:	75 Civ. 3231-CLB
ARTHUR PHILLIPS, JR., ARMAND GIANUNZIO, JOSEPH NATARO, DANIEL NATCHES, EMILIO A. DE D'BRAMO, HENRY A. GRUSE, ANGELO C. MUSTICH, LOUIS LIFRIERI, THOMAS FORTE, MICHAEL ROTH, EDITH SIDEMAN, "JOHN DOE", "RICHARD ROE", and "THOMAS HOE",	:	AFFIDAVIT
Defendants.	:	

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

LOUIS C. FIELAND, being duly sworn, deposes and says:

I am counsel to the firm of Zimmer, Fishbach & Hertan, attorneys for the defendant Edith Sideman. This affidavit is submitted in opposition to the plaintiffs' motion for a re-hearing of defendant Sideman's motion to dismiss, which was previously granted by the Court. Pursuant to the Court's decision, filed November 7, 1975, a proposed judgment has been submitted to the Court. The instant motion for rehearing asserts that the Court's determination "overlooked salient facts and points of law." In essence, the "salient facts" now set forth in the moving affidavit are quotations from newspaper articles. In any event, the claim of the plaintiffs against the defendant Sideman now has boiled down to an alleged claim against her for malicious prosecution.

AFFIDAVIT OF LOUIS C. FIELAND IN OPPOSITION TO PLAINTIFFS' MOTION TO REARGUE

The essential elements for a claim of malicious prosecution, as established by the substantive law of the State of New York, are patently missing from the purported claim based on this ground now asserted against the defendant Sideman. Further, a claim of malicious prosecution against this defendant, standing alone and stripped of any connection with constitutional questions, cannot be maintained in this Court, because the requisite diversity is not present (the plaintiffs and the defendant Sideman are residents of the State of New York).

It is respectfully submitted that the moving affidavit, despite its length, sets forth no new operative facts which require consideration or reconsideration by the Court. No new legal principles, and no law not already carefully considered by the Court, appear in the moving affidavit.

The motion for rehearing of the defendant Sideman's motion for summary judgment should be denied in all respects.

LOUIS C. FIELAND

Sworn to before me this
21st day of November 1975

Muriel Colligan

MURIEL COLLIGAN
Notary Public, State of New York
No. 41-5761555
Qualified in Queens County
Commission Expires March 30, 1976

JUDGMENT APPEALED FROM

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action, File Number 75 Civ. 3231-CLB

CHARLES AKNIN and AKNIN CORPORATION,

Plaintiffs,

-against-

ARTHUR PHILLIPS, JR., ARMAND GIANUNZIO, JOSEPH NATARO, DANIEL NATCHES, EMILIO A. DE D'BRAMO, HENRY A. GRUSE, ANGELO C. MUSTICH, LOUIS LIFRIERI, THOMAS FORTE, MICHAEL ROTH, EDITH SIDEMAN, "JOHN DOE", "RICHARD ROE", and "THOMAS HOE",

Defendants.

JUDGMENT

This action having come on for hearing on Defendant Edith Sideman's motion for an order dismissing the complaint as to her pursuant to Rule 12 for failure to state a claim, or alternatively, for summary judgment pursuant to Rule 56 F.R.C.P., and the motion having been fully submitted after hearing argument of counsel, and the Court have duly rendered its opinion and decision dated November 7, 1975,

It is Ordered and Adjudged:

1. There is no contested issue of fact and summary judgment is granted to the Defendant Edith Sideman pursuant to Rule 56 F.R.C.P., and the complaint is dismissed as to her, and the Defendants "John Doe", "Richard Roe" and "Thomas Hoe";

JUDGMENT APPEALED FROM

2. The Court finds that there is no just cause for delay pursuant to Rule 54(b) F.R.C.P., and that a final judgment should be filed at this time as to the Defendants Edith Sideman, "John Doe", "Richard Roe" and "Thomas Hoe";

3. That the Plaintiffs take nothing of the Defendants Edith Sideman, "John Doe", "Richard Roe" and "Thomas Hoe", and that as to these Defendants the action is dismissed on the merits, and that the Defendant Edith Sideman recover of the Plaintiffs Charles Aknin and Aknin Corporation her costs of this action;

4. That the caption of this action is hereby amended by deleting the names of the Defendants Edith Sideman, "John Doe", "Richard Roe" and "Thomas Hoe".

Dated at New York, New York, this 26th day of November 1975.

s/ CHARLES L. BRIEANT, JR.
U.S.D.J.

Judgment Entered: 11/28/75

s/ RAYMOND. F. BURGHARDT
CLERK

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHARLES AKNIN and AKNIN CORPORATION, Plaintiffs, -against- ARTHUR PHILLIPS, JR., ARMAND GIANUNZIO, JOSEPH NATARO, DANIEL NATCHES, EMILIO A. DE D'BRAMO, HENRY A. GRUSE, ANGELO C. MUSTICH, LOUIS LIFRIERI, THOMAS FORTE, MICHAEL ROTH, EDITH SIDEMAN, "JOHN DOE", "RICHARD ROE" and "THOMAS HOE", Defendants.	:	Civil Action File #75-3231 (CLE) NOTICE OF APPEAL

S I R S:

PLEASE TAKE NOTICE that the plaintiffs in this action hereby appeal to the United States Court of Appeals for the Second Circuit from the order of the Hon. Charles L. Brieant, Jr., United States District Judge, entered the 24th day of November, 1975, denying plaintiffs' motion for a rehearing of defendant Sideman's motion for summary judgment, and from the judgment of the same judge, entered the 28th day of November, 1975, dismissing the complaint herein against defendants Edith Sideman, "John Doe", "Richard Roe" and "Thomas Hoe", and plaintiffs hereby appeal from each and every part of the aforementioned order and judgment.

Dated, New York, New York
December 2, 1975

BUTLER, JABLOW & GELLER
Attorneys for Plaintiffs

By _____
STANLEY GELLER
A Member of the Firm
Office and P. O. Address
400 Madison Avenue
New York, New York 10017
(212) 755-2040

NOTICE OF APPEAL

TO:

ZIMMER, FISHBACH & HERTAN, Esqs.
Attorneys for Defendant Edith Sideman
919 Third Avenue
New York, N. Y. 10022

CLARK, GAGLIARDI & MILLER, Esqs.
Attorneys for Defendants Arthur Phillips, Jr., Armand Gianunzio, Joseph Nataro, Daniel Natches, Emilio A. De D'Bramo, Henry A. Gruse, Angelo C. Mustich, Louis Lifrieri, and Thomas Forte
175 Main Street
White Plains, N.Y. 10601

ATTORNEY GENERAL OF THE STATE OF NEW YORK
Attorney for Defendant Michael Roth
2 World Trade Center
New York, N. Y. 10047

CLERK OF THE COURT
United States Court House
Foley Square
New York, New York 10007

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

HOWARD HARROW, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 5 University Pl. N.Y.C., N.Y.

That on the 30 day of JANUARY, 1976, deponent personally served the within APPENDIX upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

By leaving 2 true copies of same with a duly authorized person at their designated office.

~~By depositing~~ ~~true copies of same enclosed in a postpaid properly addres ed wrapper, in the post office or official depository under the exclusive care and custody of the United Stated post office department within the State of New York.~~

Names af attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

ZIMMER, FISHBACH & HERTAN
ATTORNEYS FOR DEFENDANT-APPELLEE
EDITH SIDEMAN
919 THIRD AVE
NEW YORK, N.Y.

Sworn to before me this
30th day of January, 1976

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 1977

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